wholesale rates, with no unreasonable or discriminatory conditions or limitations. 47 U.S.C. §§ 251(c)(4), 252(d)(3); see also 47 C.F.R. § 51.603(b) (requiring equal quality, subject to the same conditions, and with the same provisioning time intervals).

BellSouth's Statement and agreements provide CLECs wholesale rates for any services that BellSouth offers to its retail customers, with the exception of those excluded from resale requirements in accordance with the Commission's rules and the orders of the Louisiana PSC. See PrimeCo Agreement § XVI (MFN clause); Sprint Spectrum Agreement § XVII (same); MereTel Agreement § XVII (same); AT&T Agreement §§ 23-28; Statement § XIV; Compliance Order at 14; see Varner Aff. ¶¶ 184-85; Milner Aff. ¶¶ 115-18 & Ex. WKM-9 (technical service descriptions).

BellSouth has filled more than 8,000 resale orders in Louisiana and over 175,000 orders in its region. See Milner Aff. ¶ 115 & Ex. WKM-8. Testing confirms the practical availability of resale services that have not yet been purchased by any CLEC. Milner Aff. ¶ 118. All known billing problems associated with resale services have been corrected by BellSouth. Id. ¶¶ 116-17.

BellSouth's discount rate of 20.72 percent, see Statement Attach. H; AT&T Agreement § 35, was established by the Louisiana PSC in Order No. U-22020 (Nov. 12, 1996), based upon cost studies provided by BellSouth and an outside consultant's application of "avoidable" cost methodologies recommended by this Commission. See Cochran Aff. ¶ 31 & Attach. A (App. A at Tab 2). The PSC again confirmed the consistency of this discount with the Act's requirements in its Compliance Order at 14. Although not strictly relevant, it is worth noting that the Louisiana

PSC's 20.72 percent wholesale discount falls well within the Commission's now defunct proxy range. 47 C.F.R. § 51.611 (overruled).

In accordance with the Louisiana PSC's holdings, services to which the ordinary resale rules do not apply include promotions of 90 days or less (which are not subject to resale requirements),[39] grandfathered services (which may only be resold to subscribers who have already been grandfathered),[40] and contract service arrangements, or "CSAs" entered into after January 28, 1997 (which are available for resale on the same terms and conditions, including rates, BellSouth offers to the end user customers).[41] Varner Aff. ¶ 184.

A CSA is an individually negotiated arrangement between BellSouth and an end user whose local service is subject to competition. Under BellSouth's General Subscriber Services and Private Line Services Tariffs for Louisiana, CSAs may only be used where "there is a reasonable potential for uneconomic bypass of [BellSouth's] services," such that a competitive alternative is available to the end user customer at a price below BellSouth's tariffed rates but above BellSouth's incremental costs. General Subscriber Services Tariff § A5.6.1 (effective July 24, 1992); Private Line Services Tariff § B5.7.1 (effective Nov. 27, 1989) (App. D at Tab __).

The Louisiana PSC approved BellSouth's pricing of CSAs for resellers because "[r]equiring BellSouth to offer already discounted CSAs for resale at wholesale prices would

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[39] AT&T Arbitration at 5 ("short-term promotions . . . should not be offered at a discount to resellers"); Order No. U-22145-A, at 3 (June 12, 1997) ("short term promotions . . . are not subject to mandatory resale).

[40] AT&T Arbitration at 6.

[41] Id. at 4.

create an unfair advantage for AT&T."[42] The PSC's decision on this local pricing matter is determinative. See Iowa Utils. Bd., 120 F.3d at 794-800. Indeed, although prior to the Eighth Circuit's recent decision the Commission sought to assert control over some local pricing matters, it has always acknowledged that "the substance and specificity of rules concerning which discount and promotion restrictions may be applied to resellers in marketing their services to end users is a decision best left to state commissions." Local Interconnection Order, 11 FCC Rcd at 15971, ¶ 952. Thus, the Commission's rules permit an incumbent LEC to "impose a restriction [on resale] . . . if it proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. § 51.613(b). Although the Commission has held that the 1996 Act provides for the resale of contract and other customer-specific offerings, Local Interconnection Order, 11 FCC Rcd at 15970, ¶ 948, the Commission has never questioned State authority to determine the appropriate discount available to resellers.[43]

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[42] AT&T Arbitration at 4. In the AT&T Arbitration and in a separate proceeding governing local competition in Louisiana generally, the PSC directed that "Contract Service Arrangements which are in place on January 28, 1997 shall be exempt from mandatory resale. All CSAs entered into after January 28, 1997, and existing CSAs upon termination after January 28, 1997 will be subject to resale at no discount." Id.; General Order, Amendments of Regulations for Competition § 1101.B.2, at 8 (March 19, 1997) (App. C, Tab 186) ("Louisiana Competition Order").

[43] Nor for that matter is there any basis to challenge BellSouth's PSC-approved approach of restricting the resale of CSAs to the end-user for whom the CSA was established. See AT&T & LCI Motion at 17-18. As noted above, the Louisiana PSC allows BellSouth to negotiate CSAs in order to respond to particular competitive situations. Resale of an individually-tailored CSA to other customers with different competitive situations would be at odds with the underlying rationale for CSAs. In short, BellSouth has demonstrated to the Louisiana PSC that its restriction of CSAs to particular customers "is reasonable and nondiscriminatory." 47 C.F.R. § 51.613(b).

The Louisiana PSC's decision not to impose a further discount for already discounted CSAs is in fact the only sensible approach. As the Commission has held, the "State commissions have established rate structures that take into account certain desired balances between residential and business rates and the goal of maximizing access by low-income consumers to telecommunications services." Local Interconnection Order, 11 FCC Rcd at 15975, ¶ 962. CSAs enable BellSouth to offer a price lower than the tariffed rate established by the Louisiana PSC to meet a competitive threat. If BellSouth lacked this flexibility, it would almost necessarily lose these customers and the contribution to total cost recovery they represent, without any opportunity to compete in a fashion that benefits the end user.

Likewise, if CLECs were entitled to an automatic 20.72 percent discount beyond the discounts already included in BellSouth's CSAs, end users would automatically be able to chop an additional discount off of BellSouth's competitive price simply by turning to BellSouth's competitors. As a practical matter, end users would never sign long-term CSAs with BellSouth; instead, they would negotiate their best price with BellSouth, sign a short-term deal, and then switch to a lower-priced reseller at the earliest opportunity. This would interfere with BellSouth's cost recovery under the Louisiana PSC's pricing regime and subvert free-market negotiations between end users and BellSouth. See generally Iowa Utils. Bd. 120 F.3d at 800-01 (noting Act's "preference" for free-market negotiations).

Conversely, the Louisiana PSC's policy regarding CSAs does not place CLECs at any competitive disadvantage. For one thing, CLECs can choose to order services for resale either at

the CSA rate, or at the tariffed retail rate minus the 20.72 percent discount. For another, the South Carolina PSC explained in the Commission's section 271 proceedings for that State,

> Because CSAs, unlike ordinary retail offerings, are individually negotiated arrangements, BellSouth does not bear ordinary marketing costs with respect to these services. It would be impossible for the Commission to determine on a case-by-case basis what additional discount, if any, is necessary to account for BellSouth's potential cost savings with respect to a particular CSA. What is clear, however, is that if applied to CSAs, the . . . resale discount applicable to BellSouth's generally available retail offerings would greatly overstate the costs avoided by BellSouth and in many cases might require BellSouth to sell services to CLECs at rates that are below BellSouth's costs.

South Carolina PSC Comments at 10, CC Dkt. No. 97-208 (Oct. 17, 1997).

There is no possible basis for speculation that BellSouth might seek to convert customers to CSAs in order to "evade" the Louisiana PSC's 20.72 percent wholesale discount. Any discount off the tariffed rate that BellSouth offers to end users through CSAs means a smaller profit for BellSouth's retail operations. Moreover, BellSouth might well earn more from a wholesale transaction at the 20.72 percent discount than a CSA at some lesser discount, because the wholesale transaction allows BellSouth to avoid negotiating the CSA, issuing end user bills, and collecting payments from the end user. Finally, the Louisiana PSC's procedures protect against any attempt to abuse the CSA process. Based on BellSouth's CSA filings, the Louisiana PSC has all the information it needs to challenge any effort by BellSouth to evade tariff restrictions on the use of CSAs.

C. Performance Measurements

As it has with OSSs, BellSouth has agreed to provide CLECs with performance measurements regarding other checklist items. These measurements will allow interested CLECs, state commissions, and this Commission to verify that CLECs are receiving network

interconnection and access in accordance with the Act. BellSouth has implemented a data warehouse to collect and produce the data necessary to generate these measurements. Stacy Performance Aff. ¶ 13. BellSouth will provide CLECs access to this data warehouse, enabling them to obtain specific results without intervention by BellSouth. Id. ¶ 15.

BellSouth has assembled from the data warehouse data to produce two types of reports. First, BellSouth has prepared contractual measurements based on existing contractual agreements with AT&T, Time Warner and US South.[44] Second, BellSouth's permanent measurements include contractual measurements but also additional measurements that BellSouth typically presents to regulatory bodies in order to demonstrate its nondiscriminatory performance. Id. ¶ 16. Permanent measurements do not displace any CLEC-specific measurements that are outlined in particular agreements. Id. Rather, permanent measurements are measurements that BellSouth, on its own initiative, has proposed and adopted to verify that it is providing services to CLECs in a nondiscriminatory fashion. Id.

Where relevant historical data are available, BellSouth applies three standard deviations (the industry standard) to its average retail performance in order to determine upper and lower acceptable limits for each measurement. Id. ¶ 20. These calculations establish statistical process control parameters against which BellSouth's service to CLECs is compared. Id. ¶ 21. If the average performance for BellSouth's services to CLECs is higher or lower than the corresponding performance measurement for BellSouth's service to itself for three consecutive months, or if a

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[44] Of these agreements, only the AT&T agreement has been approved by the Louisiana PSC at the present time.

single monthly measure is outside of the control limits, BellSouth undertakes an investigation (known as a root cause analysis) to determine the cause of the deviation. Based on this investigation, BellSouth takes the corrective action when appropriate. Id. ¶ 23.

Some service categories do not have historical data, because they are actions that BellSouth has never before had to undertake in serving its customers. See generally Michigan Order ¶¶ 210-12. To address this absence of historical data, BellSouth has published target intervals. Stacy Performance Aff. ¶ 27. Also where sufficient data have not yet been collected for a particular service category, BellSouth will use negotiated measures to set estimated values for the average, as well as the upper and lower controls, which will be adjusted as additional data become available. Id. ¶ 28. These target intervals and negotiated performance levels will allow BellSouth to begin to generate the data that it needs for future measurements. Id. ¶ 27.

The data that BellSouth has collected and analyzed establishes that for interconnection trunking, provisioning of UNEs, and resale services, CLECs are receiving nondiscriminatory service.

Interconnection trunking: BellSouth has agreed to provide four groups of measurements related to local interconnection trunking, including data specific to Louisiana. Id. ¶ 42. These measurements are: % Provisioning Appointments Met; % Provisioning Troubles within 30 days of the Installation of New Service; Maintenance Average Duration (Receipt to Clear); and Trouble Report Rate. Id. ¶ 29.

While there currently are insufficient data from which to draw state-specific conclusions for Louisiana, the regional data reveal that CLECs are receiving interconnection trunking that is

substantially similar to what BellSouth provides itself. Id. ¶ 43. For instance, the new circuit failure rate on local interconnection trunks was better for CLECs than for BellSouth retail customers for six of the eight months that measurements were taken. Id. Ex. WNS-10.

While some blockage of CLEC trunks has occurred, it is consistent with the service levels BellSouth provides to its local customers. Id. ¶ 64. In almost all cases where CLECs have experienced trunking problems, moreover, those problems were caused either by the CLEC's failure to provide BellSouth with sufficient advance notice of its trunk request, or by the CLEC's failure to be ready to add the requested trunk on time.[45] Id. ¶¶ 66-67.

Provisioning UNEs: BellSouth has published a set of target intervals for provisioning UNEs. Id. ¶ 27 & Ex. WNS-7. BellSouth has also recently finalized a similar set of target intervals for maintenance of UNEs. Id. ¶ 27 & Ex. WNS-8. In addition, BellSouth has agreed to meet with AT&T in order to establish percentage target performance levels for UNEs. Id. ¶ 18. Until sufficient data are collected, BellSouth intends to use negotiated measures to set the estimated values needed to verify that CLECs are receiving UNEs in a manner that enables them to provide service that is substantially similar to the service that BellSouth provides its own retail customers. Id. at ¶ 28.

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[45] For example, on July 10, 1997, a CLEC informed BellSouth that starting on August 1, 1997, and proceeding over the next four months, it was going to need 10,000 trunks installed in a single city. BellSouth simply could not provision that many trunks in such a short time period. BellSouth does not have 10,000 trunk terminations available for immediate ordering or use, and if BellSouth has to add equipment, its vendor may require up to twenty-six weeks before it can provide this equipment. Id. ¶ 66. Other CLECs have failed to provide any forecast of the trunks they will need, and have notified BellSouth of large trunk requests only after making commitments to end users. Id. ¶ 67.

For purposes of this application, BellSouth has provided data showing average installation intervals for unbundled loops. While no direct comparison to BellSouth retail services is possible, unbundled loops for CLECs were installed on time at a rate higher than 90 percent for six of the eight months in which measurements were taken. Id. ¶ 44. The rate was never lower than 86 percent, and in one month (March), the rate was 99 percent. Id.

Although the Commission suggested in its Michigan Order that average installation intervals were appropriate empirical evidence given the limitations of Ameritech's proxy data, Michigan Order at ¶ 212, these intervals depend upon the due dates requested by CLECs, whose business needs may call for due dates later than the soonest date available from BellSouth's systems in accordance with nondiscriminatory assignment procedures. See id. ¶ 45; see also Stacy OSS Aff. ¶¶ 32-37 (discussing due date assignments). Because BellSouth's assignment of due dates is nondiscriminatory, BellSouth's record of meeting those due dates provides a better indication of BellSouth's actual service performance. See Stacy Performance Aff. ¶ 45 & Exs. WNS-9, WNS-10, and WNS-11. BellSouth has provided with its application the data necessary to demonstrate nondiscrimination as to the establishment of due dates, the meeting of due dates, and average performance in this area.

Resale Services: BellSouth has developed permanent measurements for resale services, using the historical and current performance of BellSouth as the standard to establish statistical process control parameters. Id. ¶¶ 20-21. There are twenty-eight resale service measurements. Id. ¶ 40. Of these twenty-eight measurements, twenty-one indicate that CLECs are receiving either better service than BellSouth's own retail customers, or service that is within the control

parameters. Of the few measurements in which discrepancies favoring BellSouth's retail operations have occurred, the percentage point differentials are minimal, and do not suggest any discrimination or competitive disadvantage. BellSouth is currently initiating root cause analysis to investigate these areas, and will take corrective action as appropriate. Id. ¶ 41.

These measurements confirm that local interconnection trunking, unbundled loops, and resale services are available to CLECs on a nondiscriminatory basis. By making these performance measurements available to interested CLECs and to regulators, BellSouth gives these parties ample tools to ensure that BellSouth is providing and will continue to provide the nondiscriminatory access required by the Act. The measurements prevent the possibility of undetected back-sliding from BellSouth's commitments and ensure continued implementation of all checklist obligations.

III. BELLSOUTH SATISFIES THE REQUIREMENTS OF SECTION 272

Section 271(d)(3)(B) authorizes the Commission to ensure that "the requested authorization will be carried out in accordance with the requirements of section 272." Section 272 in turn requires compliance with structural separation and nondiscrimination safeguards that prevent a Bell company from providing its long distance affiliate with an unfair advantage over competitors. As described below, BellSouth is submitting as part of this application extensive evidence that its entry into long distance will be carried out in accordance with each of the requirements of section 272 and the Commission's implementing regulations.

Separate Affiliate Requirement of Section 272(a). BellSouth Corporation has established an affiliate — BellSouth Long Distance, Inc. ("BSLD") — that will provide in-region interLATA

services in compliance with the structural separation and operational requirements of section 272. Jarvis Aff. ¶¶ 5-9 (App. A at Tab 7).

Structural and Transactional Requirements of Section 272(b). Section 272(b)(1) provides that the required separate affiliate "shall operate independently from the Bell operating company." BSLD and BST will operate in a manner that satisfies both this statutory requirement and the Commission's implementing regulations. Jarvis Aff. ¶¶ 10-11; Cochran Aff. ¶¶ 8-19. BSLD and BST do not and will not jointly own telecommunications transmission or switching facilities or the land and buildings on which such facilities are located. Jarvis Aff. ¶ 10; Cochran Aff. ¶ 9. BST and BSLD use separate personnel to operate, install, and maintain facilities, and will continue to do so. Jarvis Aff. ¶ 10; Varner Aff. ¶ 231.

BST and BSLD also will comply with the requirements, set out in sections 272(b)(2) and 272(b)(3), that they maintain separate books and separate officers, directors, and employees. Jarvis Aff. ¶¶ 11-12; Cochran Aff. ¶¶ 11-17. In accordance with section 272(b)(4), BSLD's creditors do not and will not have recourse to BST's assets. Jarvis Aff. ¶ 13; Cochran Aff. ¶ 19.

Consistent with section 272(b)(5), all transactions between the two companies will be conducted on an arms-length basis, reduced to writing, subject to public inspection, and accounted for in accordance with all applicable Commission requirements. Jarvis Aff. ¶¶ 11-14 (describing procedures); id. ¶ 14(d) (describing procedures for posting transactions on the Internet); id. Ex. 4 (copy of Internet homepage); Cochran Aff. ¶ 20 (describing cost allocation manual).

BST and BSLD need not conduct or report transactions in accordance with the requirements of section 272 prior to receiving interLATA authorization and establishing BSLD as a section 272 affiliate. Section 271(d)(3)(B) employs the future tense, authorizing the Commission to ensure that "the requested authorization will be carried out in accordance with the requirements of section 272" (emphasis added). While "past and present behavior" under applicable rules may be relevant to ensuring future compliance with section 272 (and in Ameritech's case was "highly relevant" because Ameritech claimed already to be in compliance), Michigan Order ¶ 366, the Act does not empower the Commission to require full section 272 compliance before the BOC applicant receives interLATA authorization.

Nonetheless, in order to provide the Commission with what it may deem "relevant" information when assessing BellSouth's future compliance, BellSouth has included with its application descriptions of all transactions between BST and BSLD to date as well as of future services that may be provided. Jarvis Aff. ¶¶ 14(b)-(c). The transactions have been carried out on an arms-length basis in accordance with the Commission's applicable affiliate transaction and cost-accounting rules. Cochran Aff. ¶¶ 19-23. Accordingly, transactions conducted between March 13, 1996 (the date on which BSLD was incorporated) and August 12, 1997 (the date on which the requirements of the Accounting Safeguards Order went into effect) have been carried out in accordance with the affiliate transaction rules prescribed in the Commission's Joint Cost

Order.[46] BellSouth affiliate transactions after August 12, 1997 are conducted in accordance with the requirements of the Accounting Safeguards Order.

Agreements between BST and BSLD have been posted on the Internet in accordance with the posting procedures BST and BSLD will follow when BST operates as a section 272 affiliate. See Accounting Standards Order ¶ 122. Descriptions of transactions that have occurred between BST and BSLD (as provided in the accompanying affidavit of Victor Jarvis) also are being made available on the Internet through BellSouth's homepage, located at ⟨http://www.bellsouthcorp.com⟩. Jarvis Aff. ¶ 14(d); Cochran Aff. ¶ 26.

Nondiscrimination Safeguards of Section 272(c). Section 272(c)(1) prohibits BST from discriminating between BSLD and any other entity. In compliance with this provision and Commission regulations, and subject to the joint marketing authority granted by section 272(g), BST will make available to unaffiliated entities any goods, services, facilities and information that BST provides to BSLD at the same rates, terms, and conditions. Varner Aff. ¶ 196. These may include exchange access, interconnection, collocation, UNEs, resold services, access to OSSs, and administrative services. Id. ¶¶ 197-200. To the extent BST develops new services for or with BSLD, it will also cooperate with other entities on a nondiscriminatory basis to develop such services, so long as it is required to do so under section 272. Id. ¶ 200. BST does not and will not, for so long as the requirement applies, discriminate between BSLD and other entities with

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[46] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298, 1304, 1328 (1987), recon., 2 FCC Rcd 6283, further recon., 3 FCC Rcd 6701, aff'd sub nom. Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

regard to dissemination of technical information and interconnection standards related to telephone exchange and exchange access services, or with regard to protection of confidential network or customer information. Id. ¶¶ 201-203; see also infra Part IV.D.1 (describing regulatory and practical protections against technical discrimination). Nor will BST disclose any individually identifiable Customer Proprietary Network Information ("CPNI") to BSLD except to the extent that such disclosure is consistent with section 272 and Commission rules. Varner Aff. ¶ 206. BST will continue to provide public notice regarding any network change that will affect a competing telecommunications carrier's performance or ability to provide service, or will affect BST's interoperability with other telecommunications carriers. Id. ¶ 204.

As required by section 272(c)(2), BST will account for all transactions between BSLD and BST in accordance with applicable Commission rules. See Cochran Aff. ¶¶ 20-23.

Audit Requirements of Section 272(d). Pursuant to section 272(d)(1), BST will obtain and pay for a biennial federal/state audit, commencing after section 272's requirements become applicable. See Cochran Aff. ¶ 27. In accordance with section 272(d)(2), BST will require the independent auditor to provide this Commission and the Louisiana PSC with access to working papers and supporting materials relating to this audit. Id. ¶ 30. And, as required by section 272(d)(3), BST and its affiliates, including BSLD and BellSouth Corporation, will provide the independent auditor, the Commission, and the Louisiana PSC with access to financial records and accounts necessary to verify compliance with section 272 and the regulations promulgated thereunder, including the separate accounting requirements under section 272(b). Id. ¶ 29.

Fulfillment of Requests Pursuant to Section 272(e). Pursuant to section 272(e)(1), BST will fulfill any requests from unaffiliated entities for installation and maintenance of telephone exchange and exchange access services within a period no longer than the period in which it provides such services to BSLD. Varner Aff. ¶ 209. In addition, BellSouth will comply with all applicable Commission monitoring and reporting requirements. Id. ¶ 212.

BST will comply with section 272(e)(2) by refusing to provide any facilities, services, or information concerning its provision of exchange access to BSLD unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions. Varner Aff. ¶ 216. In accordance with section 272(e)(3), BST will charge BSLD rates for telephone exchange service and exchange access that are no less than the amount BST would charge any unaffiliated interexchange carrier for such service. Id. ¶¶ 224-225. Where BST uses access for provision of its own services, BST will impute to itself the same amount it would charge an unaffiliated interexchange carrier. Id. ¶ 225. Finally, to the extent that BST is permitted to provide interLATA or intraLATA facilities or services to BSLD, BST will make such services or facilities available to all carriers at the same rates and on the same terms and conditions, in accordance with section 272(e)(4). Id. ¶ 216.

Joint Marketing Provisions of Section 272(g). Pursuant to 272(g)(1), BSLD will not market or sell BST's telephone exchange service unless BST permits BSLD's competitors to do so as well. Varner Aff. ¶ 228.

With respect to joint marketing, BellSouth has petitioned the Commission to reconsider its discussion of Ameritech Michigan's proposed "telemarketing script," because that discussion may

be read as forbidding a Bell company from mentioning its long distance affiliate prior to reading a list of all available carriers in random order. See Michigan Order ¶¶ 375-376; Varner Aff. ¶¶ 223-24.[47] Section 251(g) preserves a BOC's pre-existing obligation to provide equal access. The Act, however, also authorizes the BOCs and their section 272 affiliates to market services jointly upon receiving interLATA relief under section 271. 47 U.S.C. § 272(g)(2). In the Non-Accounting Safeguards Order the Commission struck a balance between these provisions. The Commission explained that "the continuing obligation to advise new customers of other interLATA options is not incompatible with the BOCs' right to market and sell the services of their section 272 affiliates under section 272(g)."[48] Rather, a BOC can meet its equal access obligations in the joint marketing context by "inform[ing] new local exchange customers of their right to select the interLATA carrier of their choice and tak[ing] the customer's order for the interLATA carrier the customer selects." Id.

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[47] Another concern expressed by the Commission in the Michigan Order related to Ameritech's "Winback program." Michigan Order ¶¶ 379-380. As explained in the Varner Affidavit, BellSouth will not engage in "winback" campaigns for residential customers at least for the duration of this year. When BellSouth implements any such campaign, it will comply with section 222 of the Act and Commission regulations. Varner Aff. ¶ 228. With respect to large business customers, BellSouth will not encourage any customer to breach a contract with a competitor, but will limit its marketing efforts to contacting customers regarding new services and services similar to those under contract. Id. ¶ 229.

[48] First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, 11 FCC Rcd 21905, 22046, ¶ 292 (1996) ("Non-Accounting Safeguards Order"), modified on recon. 12 FCC Rcd 2297(1997), further recon. 12 FCC Rcd 8653 (1997), pet'n for review pending sub nom. Bell Atlantic Tel. Cos. v. FCC, No. 97-1432 (D.C. Cir. filed July 11, 1997).

When explaining that the two provisions are compatible, the Commission relied on the ex parte comments of NYNEX, id. & n.764, in which NYNEX set forth a marketing script reflecting the fact that section 251(g) "does not continue the MFJ's prohibition against 'marketing,'" but "only continues the requirement to advise new customers of available carriers if the customer does not name a long distance carrier."[49] The NYNEX script that the Commission cited approvingly informed customers that they had a choice of carriers, but did not require NYNEX representatives to list all of the eligible interexchange carriers until after NYNEX had mentioned its own long distance affiliate and asked the customer if he or she had already made a selection. Id.

This balanced approach makes sense. Any requirement that the BOC's long distance affiliate be mentioned only as part of a random list would nullify the BOC's statutory joint marketing right. Moreover, requiring a BOC to list every interexchange carrier even when the customer (after thirteen years of equal access and exposure to numerous carriers' marketing efforts) has already made up his or her mind would impose a needlessly burdensome obligation that would slow the presubscription process and annoy the BOC's local customers. Such a requirement also would be flatly inconsistent with the Commission's prior recognition that section 251(g) does not add to a BOC's pre-existing equal access obligations and that, under section 272(g), a BOC must be permitted to market the services of its long distance affiliate. Non-Accounting Safeguards Order, 11 FCC Rcd at 22046, ¶ 292. If the statute's express joint

[49] Letter from Susanne Guyer, Executive Director, Federal Regulatory Policy Issues, NYNEX to William F. Caton, Acting Secretary, FCC at 3 (Oct. 23, 1996) (emphasis added).

marketing authorization is to retain any meaning, a BOC cannot be denied the opportunity to bring its affiliate's services to the customer's attention in a preferential fashion.[50]

Compliance. BSLD has developed a compliance plan to ensure satisfaction of its obligations under section 272. Likewise, BST has an extensive compliance program in place, which will be expanded to include the company's non-discrimination obligations under section 272. Agerton Aff. ¶¶ 5-17 (App. A at Tab 1). These procedures, which are similar to procedures used to comply with judicial restrictions under the Modification of Final Judgment ("MFJ"), will ensure that the letter and spirit of section 272 and its implementing regulations are honored.

IV. BELLSOUTH'S ENTRY INTO THE INTERLATA SERVICES MARKET WILL PROMOTE COMPETITION AND FURTHER THE PUBLIC INTEREST

The final element of the Commission's section 271 analysis is a determination whether interLATA entry "is consistent with the public interest, convenience and necessity." 47 U.S.C.

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[50] See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2426 (1995) ("statutes should be read . . . to give independent effect to all their provisions"); see also Weinberger v. Hynson, Westscott and Dunning, Inc., 412 U.S. 609, 631-32 (1973) ("It is well established that our task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible'"). The Order's restrictions on joint marketing raise First Amendment concerns as well. The Commission may not restrict a BOC's ability to disclose "truthful, verifiable, and nonmisleading factual information" about its long distance affiliate's offerings absent a "substantial" government interest that reasonably "fit[s]" the Commission's restriction. Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1590 (1995); Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 416 (1993). Because the Order's approach to presubscription would deprive the BOCs of a statutory right to engage in joint marketing that Congress granted the Bell companies after full deliberations, it fails both prongs of this test. The Commission's suggested approach might, in addition, run afoul of the constitutional prohibition on coercing parties to deliver messages with which they disagree. See Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 10-11 (1986); cf. Glickman v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130, 2138 (1997) (contrasting situation in which complainants "agree with the central message of the speech").

§ 271(d)(3)(C). The remainder of this brief demonstrates that BellSouth's provision of interLATA services in Louisiana meets this test.

The Louisiana PSC held unanimously below that "consumers in Louisiana, both local and long distance, would be well served by BellSouth's entry into the long distance market." Compliance Order at 14. This conclusion is consistent with Congress's expectation, in passing the 1996 Act, that "removing all court ordered barriers to competition — including the MFJ interLATA restriction — will benefit consumers by lowering prices and accelerating innovation." 142 Cong. Rec. S713 (daily ed. Feb. 1, 1996) (statement of Sen. Breaux). The U.S. Department of Justice agrees that in-region interLATA entry by Bell companies would promote long distance competition.[51] This Commission also recently affirmed that "BOC entry into the long distance market will further Congress's objectives of promoting competition and deregulation of telecommunications markets." Michigan Order ¶ 381.

The damage done by continuing to exclude the Bell companies from in-region, interLATA services is staggering. As the attached affidavit of Professor Jerry Hausman of MIT details, delaying Bell company interLATA entry has cost U.S. residential consumers $7 billion per year, effectively imposing an annual tax on each long distance customer. Hausman Aff. ¶¶ 5, 21-23, 24 (App. A at Tab 5). This public burden cannot be justified by a desire to promote local competition. The 1996 Act already opens local markets and any additional benefit from applying some higher standard would be much less than the costs of continuing to curtail interLATA

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[51] Evaluation of the United States Department of Justice, Application of SBC Communications Inc., CC Docket No. 97-121, at 3-4 (FCC filed May 16, 1997).

competition. Id. ¶¶ 11, 24-25; see also Michigan Order ¶¶ 387, 390 (suggesting higher standards). As Professor Hausman explains, "[t]he consumer welfare gains from increased competition in long distance will more than outweigh the incremental gain from the last step to regulatory perfection" that parties such as the Department of Justice are urging this Commission to enforce as a prerequisite to interLATA relief. Hausman Aff. ¶ 25.

In Louisiana there is no offsetting benefit at all from delaying long distance competition because BellSouth's interLATA entry would increase local competition. The Louisiana PSC found that approving BellSouth's application would benefit "both local and long distance" consumers in Louisiana. Compliance Order at 14. Allowing BellSouth's entry would end the incentives of potential competitors to go slow in Louisiana, or to limit their local offerings, in an effort to delay BellSouth's entry while pursuing more profitable markets elsewhere.

A. The Scope of the Public Interest Inquiry

While the public interest inquiry generally may provide the Commission with "broad discretion . . . to consider factors relevant to the achievement of the goals and objectives of" the legislation, Michigan Order ¶ 385, it is limited by Congress's specific determinations.[52] In the 1996 Act, Congress decided that it would open local markets by enacting a competitive checklist that sets forth concrete obligations in plain terms. The "checklist" was Congress's test of "what

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[52] See NAACP v. FPC, 425 U.S. 662, 669 (1976) ("the use of the words 'public interest' in a regulatory statute . . . take meaning from the purposes of the regulatory legislation"); New York Central Sec. Corp. v. United States, 287 U.S. 12, 25 (1932) ("the term public interest' as thus used [in a statute] is not a concept without ascertainable criteria"); Business Roundtable v. SEC, 905 F.2d 406, 413 (D.C. Cir. 1990) ("broad 'public interest' mandates must be limited to 'the purposes Congress had in mind when it enacted [the] legislation'" (quoting NAACP v. FPC, 425 U.S. at 670)).

. . . competition would encompass," 141 Cong. Rec. S7972, S8009 (daily ed. June 8, 1995) (statement of Sen. Hollings), and Congress forbade the Commission from second-guessing its judgment or modifying its checklist "by rule or otherwise." 47 U.S.C. § 271(d)(4) (emphasis added); see also 141 Cong. Rec. S8188, S8195 (daily ed. June 12, 1995) (statement of Sen. Pressler) (noting adoption of checklist approach in place of "actual competition" test). As the Chairman of the Senate Commerce Committee reassured Senators, "[t]he FCC's public-interest review is constrained by the statute" because "the FCC is specifically prohibited from limiting or extending the terms used in the competitive checklist." 141 Cong. Rec. S7967 (daily ed. June 8, 1995) (statement of Sen. Pressler). Accordingly, the Commission may not use the public interest inquiry to add local competition criteria beyond those that Congress included in the checklist.

The Michigan Order nevertheless suggests that public interest approval should be conditioned in every case on exceeding the checklist. The Commission reasoned that because Congress (1) wanted the Bell companies to enter long distance only after local markets are open and (2) included both the competitive checklist and the public interest test in section 271, Congress must have viewed the competitive checklist as an inadequate mechanism to open local markets.[53] But in fact, Congress wanted the Commission to examine an essential element of Bell company interLATA entry not addressed by any other part of section 271: the competitive

[53] See Michigan Order ¶ 389 (reasoning that if "compliance with the checklist alone is sufficient to open a BOC's local telecommunications markets to competition," then "BOC entry into the in-region interLATA services market would always be consistent with the public interest requirement whenever a BOC has implemented the competitive checklist").

consequences of that entry, given the checklist and section 272's safeguards.[54] The Commission's equation of the public interest inquiry with its own assessment of local competition is implausible on its face, for it assumes that Congress devoted countless hours to honing the smallest details of the checklist and forbade the Commission from altering them, see 47 U.S.C. § 271(d)(4), and yet wanted the Commission to use a different standard of open local markets as the dispositive test in considering BOC applications.[55]

The point of the public interest test is thus to allow the Commission to examine the effect on competition of Bell company entry into the interLATA market. The principal focus of the inquiry must be the market where the effects of Bell company entry would directly be felt: the interLATA market. It cannot be the local market, for issues related solely to local competition are conclusively determined by compliance with the competitive checklist.

The Commission may as part of its public interest inquiry evaluate such matters as the current state of long distance competition and the degree to which the checklist, section 272, and other regulatory safeguards constrain anticompetitive conduct in the interLATA market. These inquiries are familiar for the Commission. As long as a decade ago, for example, the Commission addressed the hotly contested issue whether regulatory safeguards and market conditions were then sufficient to preclude the Bell companies from impeding competition in long distance. The Commission concluded that they were and thus agreed with the Department of Justice that the

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[54] See Michigan Order ¶ 388 (discussing "congressional determination" that open local markets and regulatory safeguards will protect interLATA competition).

[55] See, e.g., 141 Cong. Rec. S8188, S8195 (daily ed. June 12, 1995) (statement of Sen. Pressler) (describing extensive negotiations and work that went into developing the competitive checklist).

MFJ's line of business restrictions should be lifted, notwithstanding that the Bell companies in 1987 had no obligations to competitors comparable to the checklist.[56]

The Commission also may consider individual circumstances that Congress could not have anticipated — such as the applicant's history of compliance or non-compliance with Commission rules. See Michigan Order ¶ 397. The Commission may not, however, use the public interest inquiry to substitute its own local competition plan for that established by Congress. Over-regulation of local and long distance markets today cannot be defended in the name of ideal competition tomorrow.[57] The Commission also may not use the public interest inquiry to rewrite express provisions of the Act.[58] In particular, the public interest test may not be used as a vehicle

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[56] Responsive Comments of the Federal Communications Commission As Amicus Curiae on the Report and Recommendations of the United States Concerning the Line of Business Restrictions Imposed on the Bell Companies by the Modification of Final Judgment, at 58, United States v. Western Electric Co., No. 82-0192 (D.D.C. filed Apr. 27, 1987).

[57] See MCI Telecommunications Corp. v. FCC, 627 F.2d 322, 341 (D.C. Cir. 1980) ("The best must not become the enemy of the good."); see generally 47 U.S.C. § 271(d)(4); Conference Report at 1 (enacting a "de-regulatory national policy framework"); 141 Cong. Rec. S7895 (daily ed. June 7, 1995) (statement of Sen. Hollings) ("We should not attempt to micro-manage the marketplace"); 141 Cong. Rec. H8282 (daily ed. Aug. 2, 1995) (statement of Rep. Bliley) (Congress wanted to promote "competition, and not Government micro-management of markets"); accord Local Interconnection Order, 11 FCC Rcd at 15509, ¶ 12 ("look[ing] to the market, not to regulation" to determine entry strategies); see also Hausman Aff. ¶ 10 ("The Commission is once again failing to recognize that regulation is meant to benefit consumers, not to further other objectives of regulators.").

[58] See NAACP v. FPC, 425 U.S. at 669; United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (when "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law" statutory provision's meaning is "clarified by the remainder of the statutory scheme") (internal quotation marks omitted); National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943) (the public interest "is to be interpreted by its context").

for circumventing the specific statutory restrictions of sections 251 and 252 regarding such matters as the pricing of UNEs and resold services. Although this issue is now pending before the Eighth Circuit,[59] that Court just recently confirmed that this Commission does not have "jurisdiction over intrastate telecommunications matters" under the Communications Act unless Congress has drafted provisions that "expressly apply to intrastate telecommunications matters and explicitly direct the FCC to implement the act's intrastate requirements."[60] Because section 252 reserves pricing authority to the States, and the public interest provisions of section 271 do not purport to override that delegation of authority, the FCC is powerless to usurp State jurisdiction over pricing through the section 271 process.

B. The Current Long Distance Oligopoly Limits Competition

Turning to the core of the Commission's proper inquiry, it has long been settled that the benefits of new entry in long distance presumptively outweigh any risk of harm,[61] even where the

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[59] See Petition of the State Commission Parties and the National Association of Regulatory Utility Commissioners for Issuance and Enforcement of the Mandate (filed Sept. 17, 1997) & Petition for Immediate Issuance and Enforcement of the Mandate (filed Sept. 18, 1997), Iowa Utils. Bd. v. FCC, No. 96-3321 (8th Cir.).

[60] California v. FCC, 1997 U.S. App. LEXIS 22343, at *10 (emphasis in original) (citing Louisiana Pub. Serv. Comm'n v. FCC, 473 U.S. 355, 376-77 (1986)).

[61] See Report and Order, Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Serv. off of the Island of Puerto Rico, 2 FCC Rcd 6600, 6604, ¶ 30 (1987) ("plac[ing] a burden on any entity opposing entry by a new carrier into interstate, interexchange markets to demonstrate by clear and convincing evidence that [additional] competition would not benefit the public") (emphasis added); Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, MTS-WATS Market Structure Inquiry, 81 F.C.C.2d 177, 201-02, ¶ 103 (1980) (Commission will "refrain from requiring new entrants to demonstrate beneficial effects of competition in the absence of a showing that competition will produce detrimental effects").

long distance entrant is an incumbent local exchange carrier.[62] That presumption is especially apt when applied to this application.

The interexchange market is highly concentrated and systematically non-competitive. In the Michigan Order, the Commission repeated its "concern[s] . . . that not all segments of this market appear to be subject to vigorous competition," and "about the relative lack of competition among carriers to serve low volume long distance customers." Michigan Order ¶ 16. Likewise, in Louisiana, the PSC "has instituted its own investigation into whether long distance companies currently operating in Louisiana have properly passed access charge reductions on to their ratepayers," based on "serious questions raised at both the national level and within Louisiana regarding abuse in the long distance market." Compliance Order at 14.

In a competitive market, entry by new firms and competition by incumbent firms drive prices toward cost. See Schmalensee Aff. ¶ 9 (App. A at Tab 11); Paul W. MacAvoy, The Failure of Antitrust and Regulation to Establish Competition in Long-Distance Telephone Services 173-74 (1996) ("MacAvoy Study"). Yet long distance carriers have failed to pass on cost savings to their customers. Access charges constitute nearly half of interexchange carriers' total costs. Hausman Aff. ¶ 30. From January 1990 to July 1996 these charges declined by 27 percent, yielding at least a 13 percent reduction in interexchange carriers' total costs during that period. Id. Yet carriers have raised their prices despite these declines in access charges. See

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[62] See Inquiry into Policies to Be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Serv. Off the Island of Puerto Rico, 2 FCC Rcd at 6604, ¶ 30 (Commission's "open entry policy," "clearly contemplate[s] competitive entry by independent local exchange companies") (citing MTS-WATS Market Structure Inquiry, 81 F.C.C.2d at 186)